

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	Docket No. 07-0483
Development of net metering	:	
standards required by P.A. 95-0420	:	

**REPLY COMMENTS OF THE STAFF OF THE ILLINOIS
COMMERCE COMMISSION ON THE GENERAL RULE**

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, and pursuant to Section 200.800 of the Illinois Administrative Code (83 Ill. Adm. Code 200.800), respectfully submits its Verified Reply Comments ("Reply Comments") in the above-captioned matter.

Staff thanks all of the parties for their insightful Initial Comments. Environmental Law & Policy Center ("ELPC"), MidAmerican Energy Company ("MEC"), the Ameren Illinois Utilities ("Ameren"), Commonwealth Edison ("ComEd"), Constellation New Energy, Inc. (CNE"), and the People of the State of Illinois ("AG") all filed Initial Comments.

Staff has considered all of the parties' proposals and adopted the proposals that Staff concluded should be in the rule. Many of the parties recommended changes to Staff's sponsored rule were "ministerial" in nature. Staff endeavored to adopt such ministerial proposals if, in Staff's view, such proposals did not have a substantive impact on other aspects of the rule and did not run afoul of the Joint Committee on Administrative Rules' ("JCAR") rulemaking requirements. Some of JCAR's rule-making

requirements are not intuitive, such as capitalization of defined terms. The Commission, nonetheless, must abide by them.

Staff will reply to the Initial Comments party by party. Staff also attaches a Staff-sponsored redlined-rule attached to these Reply Comments as Att. A. Attachment B is a clean version of Att. A. Attachments A and B are similar to the rule Staff attached to its Initial Comments but are updated to reflect the proposed changes Staff considered and adopted.

ComEd

ComEd recommended changes to several rule sections. ComEd proposes to add two subsections to Section 465.40 (Net Application and Enrollment Procedures) to require an electricity provider that is not the electric utility delivering power to the customer to notify the electric utility that its customer has chosen or cancelled net metering. It appears reasonable to Staff that an electric utility could have a legitimate interest in keeping track of the number of net metering customers on its system, so Staff does not oppose this proposal.

ComEd recommends several clarifying wording changes to Section 465.50 (Electricity Billing for Eligible Customers) that should be adopted. Additionally, ComEd suggests clarifying that in situations where a net metering customer with generating facilities under 40 kW that is not served by an electric utility earns a credit for sales of excess kilowatt-hours to its electricity provider, the customer will be given a delivery-based credit from the electric utility. That recommendation should be adopted.

ComEd recommends clarifying that the reporting requirements described in Section 465.40 begin in 2009. Since net metering will not commence until April 2008,

ComEd's suggestion is reasonable and should be adopted. In summary, Staff concluded that each of ComEd's proposals were helpful, did not undermine any substantive aspect of the Staff-sponsored rule and thus were adopted as reflected in Att. A.

Attorney General

The Attorney General recommends several revisions to the rule. First, the AG recommends adding a sentence to Section 465.40(d) to ensure that customers who applied during the one-month open enrollment period described in Section 465.40(c) would be placed first in the queue that is established immediately after the open enrollment period. Other provisions in the Section 465 may cover this situation, but its inclusion might be helpful to customers. Therefore, the AG's recommended language is added to the revised rule. Second, the AG recommends adding the words "to the net amount purchased" to Section 465.50(a)(1)(iii) to clarify that the electricity provider may assess charges only on the net amount purchased. This addition would be helpful in clarifying the rule, and Staff's recommends its adoption, except that Staff would prefer changing the word "to" to "on". Third, the Attorney General recommends language for Section 465.50(b)(1)(i). This language would require electricity providers, when calculating compensation for net sellers of electricity, to determine the net excess kilowatt-hours (*i.e.*, comparing the amount sold with the amount purchased by the customer) before applying the avoided cost rate. The recommendation sounds reasonable but it appears to Staff that would be unworkable or problematic for the utilities that have tariffs in which there are multiple avoided cost rates. Which "avoided cost" should be applied to the excess kilowatt-hours generated; *i.e.*, the highest rate, the

lowest rate or some average that is not stated in the utility's tariff? Staff recognizes that the AG's suggestion appears to track the statute, and might, in some cases, provide customers with more compensation than is available under current tariffs. However, adoption of the AG's language would likely result in new problems that would need to be resolved by the Commission, such as changes to existing tariffs.

The Attorney General also proposed that additional language to the "Miscellaneous" section, Section 465.90(a), "to protect consumers that have existing retail contracts with ARES, where those contracts require the customer to pay a fee to terminate service." AG Initial Comments, at 3. The AG proposes to change Section 465.90(a) as denoted by the additional language in bold below:

- a) In accordance with Section 16-107.5(e) and (f) of the Act, nothing in this Part is intended to prevent an arms-length agreement between an electricity provider and an eligible customer that either (i) that sets forth different prices, terms, and conditions for the provision of net metering service, including, but not limited to the provision of the appropriate metering equipment for non-residential customers, or (ii) sets forth the ownership or title of renewable energy credits. In accordance with Section 16-107.5(m) of the Act, nothing in this Part is intended to affect existing retail contracts between an alternative retail electric supplier and an eligible customer. **However, in cases where an existing retail contract requires an eligible customer to pay a fee to terminate service with the alternative retail electric supplier, the alternative retail electric supplier must offer net metering service to that customer on terms that meet at least the minimum requirements set forth in Section 465.50 of this Part .**

AG Initial Comments, at 3-4.

Although Staff is appreciative of the AG's endeavor to protect unwitting consumers, the Commission is a creature of statute and only has those powers that the General Assembly that expressly conferred by the legislature. *Business and Professional People for the Public Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192,

244, 555 N.E.2d 693, 716-17 (Ill. 1990). Moreover, the Illinois Supreme Court has long held that an administrative agency can neither limit nor extend the scope of its enabling legislation. *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002) (“An administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity.”). The Commission, consequently, must follow and implement the PUA’s plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). See *Interim Order on Remand (Phase I)*, Filing to Implement Tariff provisions of Section 13-801 of the Public Utilities Act, ICC Docket 01-0614 (April 20, 2005).

Staff has found no authority that would allow the Commission to delve into contracts between an ARES and its customers. Although the language of Section 16-107.5 uses the defined term “electricity provider”, which includes ARES, in the provisions of Section 16-107.5 from which Section 465.50 emanated, the General Assembly clearly treated ARES differently from utilities in certain respects. These differences are reflected in the language contained in the Staff-sponsored portion of Section 465.90(a).

The AG’s proposal, furthermore, presumes that a customer that entered into a contract requiring an early termination fee automatically, without more, entered into an “unconscionable” contract. The General Assembly, however, noted that ARES may enter into contracts with customers that charge an early termination fee. In Section

5/16-115A(c), entitled the “Obligations of alternative retail electric suppliers”, the General Assembly states:

(c) No alternative retail electric supplier, or electric utility other than the electric utility in whose service area a customer is located, shall (i) enter into or employ any arrangements which have the effect of preventing a retail customer with a maximum electrical demand of less than one megawatt from having access to the services of the electric utility in whose service area the customer is located or (ii) charge retail customers for such access. This subsection shall *not* be construed to prevent *an arms-length agreement between a supplier and a retail customer that sets a term of service, notice period for terminating service and provisions governing early termination through a tariff or contract as allowed by Section 16-119.*

220 ILCS Section 5/16-115A(c)(italics added).

Similar to Section 5/16-115A(c), section 5/16-119, entitled “Switching suppliers,” states that:

Sec. 16-119. Switching suppliers. An electric utility or an alternative retail electric supplier may establish a term of service, notice period for terminating service and provisions governing early termination through a tariff or contract. A customer may change its supplier subject to tariff or contract terms and conditions. Any notice provisions; *or provision for a fee, charge or penalty with early termination of a contract;* shall be conspicuously disclosed in any tariff or contract. A customer shall remain responsible for any unpaid charges owed to an electric utility or alternative retail electric supplier at the time it switches to another provider.

220 ILCS Section 5/16-119 (italics added).

Thus, where the AG presumes unconscionable conduct, the General Assembly expressly provides for early termination fees in arms-length agreements.

Finally, the AG cites to *Hartford Fire Ins. Co. v. Architectural Management, Inc.*, 194 Ill. App. 3d 110, 116 (1st Dist. 1994) (“*Hartford*”) to support its proposal. *Hartford*, however, is of little value in supporting the AG’s proposal. In *Hartford*, the court concluded that a liquidated damages provision in a contract between a school district

and a fire alarm installer that limited the damages the fire alarm installer could be liable to \$90.00, despite a fire that occurred in the school. In reaching its conclusion, the *Hartford* court noted that:

Despite any disparity in bargaining power between the defendant and plaintiffs' subrogor in the instant case, we do not believe that the contract can be characterized as unconscionable. The liquidated damage provision was clear and explicit and limited defendant's liability to six times the monthly fee.

Hartford, at 194 Ill. App. 3d 110, 116.

Again, the AG presumes that any contract between an ARES and its customer that contains an early termination fee is conclusive evidence of a disparity in bargaining and, thus, is automatically unconscionable. *Hartford*, however, instructs us that the mere fact that a questionable provision is contained in a contract does not automatically lead to a conclusion of unconscionable conduct. *Id*; *See also., Preston v. Kruezer*, 641 F. Supp. 1163, 1172 (N.D. Ill. 1986) (“The mere fact that one party to a contract enjoyed little relative bargaining strength however cannot alone render a contractual provision unenforceable.”). As the AG partially noted, *Hartford* stands for the proposition that, “[t]he term unconscionable encompasses the absence of meaningful choice by one of the parties as well as contract terms which are unreasonably favorable to the other party.” *Hartford*, 194 Ill. App. 3d at 116. Here, however, the AG merely presumes, without any evidence, both the absence of meaningful choice and unreasonable terms. Such a presumption is both inconsistent with the applicable case law and with Sections 5/16-115A(c) and 5/16-119 of the PUA, which expressly provides for early termination fees in an arms-length contract between an ARES and its customers.

ELPC

ELPC recommends a change to Section 465.40 intended to ensure that a customer whose net metering application has been approved will have a full 12 months to execute an interconnection agreement with the electric utility. ELPC notes this change is necessary because it is possible that an electric utility's interconnection review may last for a substantial part, or even all, of the 12-month period, leaving an authorized customer little or no time to review and sign the interconnection agreement. ELPC therefore suggests that the 12-month clock should not "tick" while the customer's interconnection application is under review by the electric utility. Presumably, under ELPC suggestion, the 12-month clock would not begin until the electric utility's review is complete and the utility presents an interconnection agreement to the customer for review.

Staff is sympathetic to ELPC's suggestion. A customer that has received authorization to begin net metering and fully intends to sign an interconnection agreement and commence operation should not be deprived of this opportunity solely because the interconnection review process took longer than expected. However, Staff has been assured by the utilities that this situation should not arise; that is, the interconnection review process for generating facilities under 2,000 kW should not take 12 months, so that customers should have ample time to review the interconnection agreement. Therefore, Staff does not recommend adoption of ELPC's suggestion. Staff, expects, however, in situations where the interconnection review process is anticipated to take longer than expected, that utilities will strive to assist the customer in completing the interconnection process within the required timeframe.

ELPC discusses a billing situation that would affect customers with generating facilities under 40 kW that are billed for delivery service through a demand (*i.e.*, kW-based) charge. This situation is applicable to many, or perhaps the majority, of non-residential customers. (ELPC notes, that, for example, ComEd assigns a demand charge to all nonresidential retail customers that have a peak demand over 10 kW. ELPC Initial Comments, f. 1.) In such a situation, a customer could be a net purchaser of electricity, but nevertheless would be assessed a demand charge for its distribution service if the utility delivered any electricity to the customer during the billing period. This result starkly contrasts with the outcome for customers assessed a kWh-based distribution charge. Such customers would receive a distribution credit for the amount of excess kWh sold to the electricity provider, rather than paying for delivery. Thus, it would appear that smaller customers with generating facilities under 40 kW would be treated differently than larger customers with similar-sized facilities.

ELPC thus points out a peculiar result of the net metering law that may seem unfair to nonresidential customers. The question is whether this result was intended by the General Assembly. One argument in favor of the ELPC recommendation is that the General Assembly recognized that customers that are subject to a demand charge can already receive compensation from the utility by selling excess kilowatt-hours back to the grid. See *e.g.*, 83 IL Adm. Code Part 430. Thus, according to this argument, to encourage net metering, the General Assembly would presumably require additional compensation so that generators could do better than the status quo. Under ELPC's suggestion, this additional compensation is a partial or full waiver of the kW-based distribution charge.

On the other hand, the law is clear that customers with generators under 40 kW are to receive a “1:1” kilowatt-hour credit, consisting of the value of the electricity itself and kWh-charges for excess kilowatt-hours sold to the electricity provider (noting, however, that the distribution portion of the credit is provided by the electric utility). 220 ILCS 16-107.5(d)(2). This is reflected in the rule. See e.g., Section 465.50(a)(1)(i) and (a)(2)(iii).

While symmetrical treatment for seemingly similar-situated customers would seem logical and even desirable, Staff cannot find support in the net metering act to allow customers to receive any credit for kilowatt-based charges. Thus, Staff does not support ELPC’s change. Staff notes, however, that if the Administrative Law Judge does accept ELPC’s argument that the demand charge should be partially or fully waived for kW-based distribution charges, a question would arise whether ELPC’s recommendation, or some other similar recommendation, would be appropriate. Staff is not aware of any standard method that would accomplish the task that ELPC recommends. However, ELPC’s recommended language would probably serve the purpose as well as any other methodology.

ELPC recommends that Section 465.50(b)(1)(i) clarify that the number of kilowatt-hours subject for compensation at the avoided cost rate is limited to the number of “excess” kilowatt-hours generated by the customer. A similar suggestion was offered by the Attorney General. For the reasons cited in the discussion above, Staff does not support this recommendation.

ELPC also argues that “Electricity providers should report the results of their ‘consideration’ of meter aggregation.” ELPC Initial Comments, at 5. As ELPC notes,

Section 16-107.5(l) of the Act requires electricity providers to “consider” whether to allow meter aggregation. *Id.* Section 16-107.5, however, does not require electricity providers to do anything more than “consider: it does not require any reporting of electricity providers’ consideration of meter aggregation. As noted above in its reply to the AG, the Commission is a creature of statute and can neither diminish nor expand upon clear directives of the PUA. Section 16-107.5(1) requires electricity providers to “consider” meter aggregation; it does not require them to report anything on the results of their consideration. The General Assembly is perfectly aware of how to impose reporting requirements as it did so in Section 16-107.5(k). The General Assembly, however, chose not to include a reporting requirement in Section 16-107.5(l). Reporting the results of an electricity provider’s consideration of meter aggregation goes beyond the requirements to merely “consider” of Section 16-107.5(l). Consequently, Staff recommends against including any type of reporting requirement on the results of electricity providers’ consideration of meter aggregation.

MidAmerican Energy Company (“MEC”)

MEC offers several recommendations. First, MEC comments on the definition of “Annual Period,” noting that the law does not appear to contemplate an Annual Period consisting of more than 12 months. As noted in Staff’s Initial Comments (at 3), it appears that that an initial “Annual Period” might last less than 12 months (for example, if a customer began net metering in August, its initial Annual Period might end in April). Subsequent annual periods would end either in April or October and last 12 months.

Second, MEC notes that Section 465.40 should clarify that the Ameren utilities, ComEd and MEC can only offer net metering to 200 new customers for the year starting

April 1st, 2008. Thus, the word “may” should be replaced by “will be limited” to. Staff agrees and has made the change in the revised rule.

Third, MEC suggests clarifying that a customer who has signed an interconnection agreement but has not begun operation may purchase “an additional” six months time in the “queue.” Staff agrees that the intent of the rule was to limit customers extra time to six months, 24 months altogether. This change has been made in the revised rule.

Fourth, MEC recommends changes to Sections 465.50(a)(iii) and 465.50(b)(iii). MEC suggest clarifying those customers that are subject to a kW-based distribution charge should not receive a full or partial waiver of that charge. This issue was discussed above in Staff’s comments on ELPC’s polar opposite recommendation, which Staff does not support.

MEC’s recommendation would use the term “metered registration,” which presumably means that a customer would receive a credit only for those charges that are kilowatt-hour based, including distribution charges (for some customers), kilowatt-hour-based transmission charges, but excluding “flat” charges, such as customer charges. Staff does not disagree that the MEC has correctly interpreted the crediting methodology. However, it appears that the term “metered registration,” while descriptive, might be unfamiliar to some customers, and would therefore have to be defined in the rule. Staff believes the intent of the rule with regard to the crediting methodology is clear, so it recommends against adoption of MEC’s recommendation.

The next change that MEC recommends for Sections 465.50(a)(iii) and 465.50(b)(iii) concerns unused credits; *i.e.*, those credits that would expire at the end of

the Annual Period. MEC suggests adding the phrase “regardless of period when earned” to these Sections. While MEC does not discuss the reason for the change, except that the change is made for purposes of consistency with statutory language, presumably the purpose of the language is to ensure that credits earned in the last month of an Annual Period would not carry over until the next Annual Period. Since Section 16-107.5(d)(2) is clear that credits expire at end of the “annualized” period, and that period would expire in a defined time period, Staff believes MEC’s suggestion is unnecessary.

The fourth suggestion that MEC offers for Sections 465.50(a)(iii) and 465.50(b)(iii) is a sentence that would allow utilities to refuse to convert kWh credits to cash. Staff believes this recommendation is unnecessary, as credits due to customers with generators under 40 kW are not intended to be redeemed for cash. Rather, credits are used as payment for kilowatt-hours purchased from the electricity provider, and a positive balance of credits expire when the customer terminates service or at the end of the Annual Period.

Fifth, MEC recommends changes that would be applicable to Sections 465.50(b)(1)(i) and 465.50(b)(2)(i). The first change would clarify that the delivery taxes and associated fees and charges would be assessed by the electric utility. ComEd made a similar recommendation. Staff finds both recommendations to be appropriate. The revised rule reflects ComEd’s suggestion. The second change, in those same sections, proposes a statement that delivery charges are to be assessed “before applying any generation credit.” Since the law and the rule state that delivery charges are to be assessed on the “gross amount of electricity supplied,” this change seems

superfluous, and Staff recommends against its adoption. Next, MEC recommends clarifying that “electric utilities” may use the compensation due to the customer to offset any charges owed by the customer. Rather than accepting this change, Staff recommends clarifying that an “electricity provider” may use the compensation to offset charges owed to the electricity provider.

Finally, MEC recommends clarifying that Section 465.50(b)(2)(i) should state that compensation due to time-of-use customers should be paid at “avoided cost.” Staff does not support this change. Section 16-107.5(f)(3) states that time-of-use customers that are net sellers of electricity are to be compensated at the rate the electricity provider would charge:

When those same customer-generators are net generators during any discrete time of use period, the net kilowatt-hours produced shall be valued at the same price per kilowatt-hour as the electric service provider would charge for retail kilowatt-hour sales during that same time of use period.

220 ILCS Section 16-107.5(f)(3).

It is clear that the rate depends on the type of retail rate under which the customer is taking service. For example, some time-of-use customers pay rates that vary hourly as wholesale market prices change; these rates are not known in advance and are not stated in the tariff or contract. Other customers may pay rates that vary less frequently – for example, the rate may change twice per day and on a seasonal basis – and such rates could be stated in a tariff or contract. In neither case would compensation be valued at “avoided cost.” Moreover, the rule’s use of the term “applicable rate,” is meant to be inclusive of each of these situations, and could also apply in a situation when an electricity provider’s tariffed or contract rate is legitimately

valued at avoided costs. For these reasons, Staff recommends against adoption of MEC's proposal.

Constellation ("CNE")

CNE offers a number of suggestions for improvement to the rule. First, CNE correctly notes that the term "Electricity Providers" is not defined. The revised rule changes that term to the singular. Second, CNE proposes to add language to 465.50(a)(1)(iii) to indicate that credits due to customers with generating facilities under 40 kW should be valued at the "tariffed or contract rate." This language is unnecessary, would change the meaning of the sentence, and is perhaps not correct. The language in 465.50(a)(1)(iii) simply states that net sellers would earn credits. These credits are used as payments for future purchases. No valuation of the credits is needed. Next, CNE notes that in several places "utility" should be replaced by "electricity provider." These changes have been made in the revised rule.

CNE also argues that additional language should be appended to the "Miscellaneous" section, Section 465.90, to "adequately address any applicable limitations on the scope of the authority of an ARES to serve certain classes of customers that may exist by virtue of its ARES Certification as granted by the Commission." CNE Initial Comments, at 2. CNE proposes to change Section 495.90(b) as indicated below in underline:

Nothing in this rule shall be construed to impose upon alternative retail electric suppliers additional obligations that they do not otherwise have under the Public Utilities Act to serve customers. Nor shall anything in this rule be construed to impose an obligation alternative retail electric suppliers to serve customers or customer classes that exceeds that authority contained in the certification granted by the Commission to the alternative retail electric supplier.

CNE Initial Comments, at 2, Att. A, at 7-8.

Staff finds this proposal to be both vague and ultimately unnecessary. Because CNE failed to fully articulate why they propose the change, Staff is left to speculation. It appears that CNE would like its certification to fully define its obligations to serve certain classes of customers. However, the General Assembly itself has added requirements on an ARES independent of its certification.

For example, Section 16-115A(d), imposes the following independent obligations on ARES while recognizing its certification:

(d) An alternative retail electric supplier that is certified to serve residential or small commercial retail customers shall not:

(1) deny service to a customer or group of customers nor establish any differences as to prices, terms, conditions, services, products, facilities, or in any other respect, whereby such denial or differences are based upon race, gender or income.

(2) deny service to a customer or group of customers based on locality nor establish any unreasonable difference as to prices, terms, conditions, services, products, or facilities as between localities.

220 ILCS Section 16-115A(d).

Of course, Section 16-107.5 also adds a new obligation on ARES, which is to offer net metering to customers they serve when requested. Staff's sponsored rule does not add any obligations (that is the obvious meaning of Staff's sponsored language in Section 465.90) on an ARES that the General Assembly has not already seen fit to impose upon an ARES. CNE's proposal would, at best, muddy an ARES' obligations under the PUA, and, at worst, has the potential to undermine certain ARES' obligations the General Assembly has found necessary to include in the PUA. Staff recommends against including CNE's proposed language in Section 495.90(b).

Ameren

Although Ameren notes that the target rule “leaves little substantive issues remaining to comment on,” it proposes numerous changes, primarily if not entirely “ministerial” in nature. Starting with Ameren’s last bullet-point first, Ameren proposes capitalizing all defined terms for consistency throughout the document. As noted earlier, JCAR’s rulemaking requirements are at times less than intuitive. In fact, the undersigned often neglects to accommodate certain JCAR requirements out of long practice, which likely was partially responsible for Ameren’s worthy effort to clean up certain inconsistencies.

JCAR’s capitalization requirement of defined terms is an example of its requirements that are less than intuitive. Contrary to intuition, defined terms are not always capitalized: rather, only the first word in a defined term is generally capitalized in the definitions section. Likewise, when the defined term appears in the subsequent body of the rule, the defined term is *not* capitalized. This leads to the awkward result that when one reads an Illinois administrative rule the reader has no “signposts” providing clues to the reader into defined terms by capitalizing them. Although puzzling, JCAR consistently insists that defined terms are not capitalized in the body of the rule and only the first word of a multi-word defined term is capitalized in the definitions section.

Notwithstanding the issue of capitalization of defined terms, Ameren’s ministerial recommendations are generally well-founded. As reflected in Att. A, Staff has adopted many of Ameren’s proposals where they did not conflict with other changes Staff has made.

Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully request that its recommendations be adopted in their entirety consistent with the positions articulated above.

/s/ _____

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January 23, 2008

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